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No. 21803

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNIFORM OIL COMPANY,
a Montana corporation,

FEB 2 1969

Appellant,

-vs.-

PHILLIPS PETROLEUM COMPANY,
a Delaware corporation,
W. J. BRIDGES, DONALD W. CULLEN,
CURTICE GARDNER and JAMES H.
NORWOOD,

Appellees.

BRIEF OF APPELLEE PHILLIPS PETROLEUM COMPANY ON THE MERITS

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Appellee.

BRIEF OF APPELLEE PHILLIPS PETROLEUM COMPANY ON THE MERITS

JURISDICTIONAL STATEMENT

No question is raised by appellee Phillips Petroleum Company as to jurisdiction.

STATEMENT OF THE CASE

This brief will cover separately the issues of Conspiracy, Interstate Commerce and Damages, following the format of appellant's brief. The evidence on each subject and also matters in appellant's Statement which are controverted will be covered in the argument on that subject.

Throughout this brief appellee Phillips Petroleum Company will be referred to as "Phillips" and appellant Uniform Oil Company as "appellant."

SUMMARY OF ARGUMENT

1. *Conspiracy*

The lower court's findings that Phillips had no knowledge of any conspiracy among the individual appellees, if one existed, are correct; no other findings are possible on the record.

Appellant's Statement of the Case on conspiracy is misleading in stating that Phillips had control over appellee Bridges, an independent jobber, either by leases to Bridges or in any other manner. (p. 7) As a jobber Bridges purchased gasoline from Phillips outright and could do with it as he pleased. (p. 7) Bridges could, and did, lower the retail price at his own station without consulting Phillips. (p. 9) Phillips did not have knowledge or notice of any conspiracy, if one existed (p. 15); Phillips did not lower its prices to Bridges as a jobber until almost three months after the action was filed, and then not until several weeks after the other suppliers in Helena had granted competitive price allowances. (p. 13)

None of appellant's cases is in point on the facts and appellant does not argue that any of them is.

2. *Interstate Commerce.*

Before appellant could recover from Phillips, even if a conspiracy to which Phillips was a party had been established, it would have had to prove by a preponderance of the evidence either that the Phillips gasoline sold in Helena was in interstate commerce

or that the conspiracy substantially affected interstate commerce. (p. 27)

The conspiracy charged is price-fixing of Phillips gasoline at the retail stations of the individual appellees *in Helena*, Montana. (p. 27) There is no showing that this gasoline was *in the flow of commerce.* (p. 31) The record is silent as to the place where the gasoline obtained by Bridges, as a jobber, was refined and also as to the place from which it was shipped. (p. 31) Bridges sold some of it at his own retail station *in Helena* and sold and delivered the balance to the other individual appellees, who sold it at their retail stations *in Helena.* (p. 31) The entire activity was intrastate in character. (p. 32)

There is no evidence whatsoever that the alleged conspiracy substantially affected interstate commerce and appellant does not argue that there was any such substantial effect. (p. 35)

3. *Damages.*

The only evidence of the value of Appellant's business is the unsubstantiated testimony of its president that it was worth $60,000.00 as a going business. (p. 35) There was no evidence as to profits, if any, which appellant had made, nor is there any other foundation for the estimate. (p. 36) For that reason the evidence of appellant's president was not properly admissible over objection, which was duly made (p. 40); in any event it has no probative value.

Under the above circumstances the judgment in favor of Phillips should be affirmed on the separate

ground that appellant failed to prove the amount of damages sustained by it, if any.

ARGUMENT

CONSPIRACY

I. Lower Court Correctly Found Phillips Had No Knowledge Of Any Conspiracy

After both parties rested counsel for Phillips made a motion for non suit or directed verdict on the following grounds, among others:

1. Plaintiff had failed to prove that Phillips was a party to any combination or conspiracy whatsoever. (Tr. 175)

2. Plaintiff had failed to prove that Phillips was a party to any conspiracy designed to injure plaintiff. (Tr. 175)

3. Plaintiff had failed to prove that Phillips conspired to monopolize or restrain trade or to eliminate competition in Helena, Montana, or to destroy plaintiff's business or eliminate all "independents" from Helena. (Tr. 175, 176)

The motion was granted. (Tr. 180 and Judgment, R. p. 60)

In the discussion on the motion the court made the following statements:

> "THE COURT: Well it seems to me that with respect to Phillips the plaintiff is in trouble; at least in proving any knowledge on the part of Phillips of any kind of conspiracy going on here." (Tr. 176, 177)
>
> * * * "what evidence is there to show that Phillips had any knowledge of that business, or of those agreements? The only thing that tends

to tie Phillips in is the evidence to the effect that — what is his name, Hamilton?

MR. SKEDD, (Appellant's counsel): Donald Hamilton.

THE COURT: — that Hamilton was at one meeting. And the witness who testified to that said he was at a meeting; that there were no agreements reached; that the price was discussed. Now, this is the substance of the Phillips' knowledge as I see the evidence.

MR. SKEDD: I think — might I say something?

THE COURT: Yes. I want you to answer that.

MR. SKEDD: I think we have a meeting in Spokane.

THE COURT: But you don't get anywhere with that, Mr. Skedd, because he went over to ask — granted he was evasive, and you don't have to believe him, but you can't establish anything by disbelieving a witness; that is, it doesn't supply proof, and all we get out of that is that he asked them if they would help him out and they said no." (Tr. 177, 178)

In response to a reference by Uniform's counsel to the telegram which Bridges sent Phillips (Individual Defendant's Exhibit 1) some three months after suit was filed the Court said:

"THE COURT: As I see it, that doesn't show any more than Phillips was being told that its dealers out here weren't going to be able to survive unless Phillips lowered the price to them. Doesn't tend to prove any knowledge of a conspiracy on Phillips' part. (Tr. 179)

* * *

"THE COURT: * * * I am going to grant the motion as to Phillips on the ground that I sug-

gest; and so let the record show that the motion of Phillips Petroleum Company for a directed verdict — what do we call this thing a motion for?" (Tr. 180)

Counsel for plaintiff-appellant requested that the court make a finding on this subject, and the court made the following oral finding:

> "THE COURT: Well, the finding that I would make in this respect, and I am not sure about the requirement, is this:
>
> "That as the Court views the evidence there is not sufficient evidence now, if it be assumed that a conspiracy has been proved as to the individual defendants, to indicate that the defendant Phillips Petroleum Company had any knowledge of that conspiracy. The act of Phillips, as the Court views it in granting what has been variously referred to as the subsidy and the competitive price adjustment, in the Court's opinion would not be sufficient to make them guilty of an antitrust violation in the absence of some knowledge that an illegal conspiracy had been created by the individual defendants." (Tr. 181)

The judgment recites that the jury was directed to render its verdict in favor of Phillips. (R. p. 60) We will show that no other decision was possible on the record.

II. Appellant's Statement of Case Is Misleading

Appellant's opening statement on the subject of conspiracy in its brief, so far as it applies to Phillips, is misleading in the extreme. (Br. pp. 6, 7)[3]

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[3] In the opening paragraph of its statement appellant states that it relies in part on the "rejection of Exhibits." (p. 4) None of the rejected exhibits dealt with conspiracy, but in any event appellant abandoned this contention. (Appellant's Br. p. 7)

The first sentence reads:

> "Phillips Petroleum Company had control over the operations of W. J. BRIDGES by use of the lease agreement, (Tr. 63, 64), national advertising, uniform station appearance and National Credit Cards. (Tr. 117, 118, 119)."

Instead of supporting appellant's statement that Phillips had control over the operation of appellee Bridges, the record is absolutely undisputed that Phillips had no control whatsoever over Bridges.

Bridges was a jobber in Helena for Phillips gasoline. (Appellant's brief, pp. 6, 19) He was not a consignee. (Tr. 59) As a jobber, Bridges was an entirely independent business man. He purchased the product outright; he furnished his own plant; he carried his own credit; he owned the product himself and could do with it as he pleased. (Tr. 98, 99) Phillips could not "cancel a jobber out." (Tr. 107) If Bridges chose to give the product away, Phillips could not prevent his doing so.

So far as the leases from Phillips to Bridges are concerned, the record is barren of any evidence as to the provisions of any lease. In accordance with the usual practice, Phillips leased the Phillips stations in Helena to its jobber Bridges; Bridges operated one station himself and subleased the other three retail stations by verbal arrangements to the other individual appellees. (Tr. 64-70) In this situation, as in every other instance, Phillips had no contact with any of these retail dealers except through a district representative,[4] who was completely without knowl-

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[4] The district representative was Don Hamilton. The testimony as to him is analyzed at p. 10 post.

edge or notice of any conspiracy among the dealers, if one existed, and who had no authority with respect to prices.

Appellant next refers to Phillips' control over Bridges by the use of "national advertising, uniform station appearance and National Credit Cards." In support of that statement, appellant refers to pages 117, 118 and 119 of the transcript. That testimony relates entirely to a retail station operated by appellee Gardner under a verbal agreement with Bridges, Phillips' independent jobber. All that it shows is that the station was painted the uniform Phillips red and white. (Tr. 118) On page 120, the witness stated that Phillips had no set rules and regulations.

It must be borne in mind that appellant's brief refers to control over Bridges by the use of these media. Nowhere in the entire record does it appear that Bridges' station was of uniform appearance, or that he used national credit cards, or that he contributed in any manner to Phillips' national advertising.

This is just one of many examples of attempts by appellant to substitute innuendo for proof.

The following sentence on page 6 of appellant's brief reads:

> "During the month of March, 1964, W. J. BRIDGES met in Spokane, Washington with his 'boss' and other management personnel of the Phillips Petroleum Company and discussed gasoline prices. (Tr. 73, 74, 75, 76, 79, 80, and 81)"

Here again appellant seeks to convey or create an impression in the guise of stating a fact. The plac-

ing of the word "boss" in quotation marks suggests a connotation flatly refuted by the record.

Taking up the transcript pages referred to by appellant in support of this statement seriatim, Bridges went to Spokane to negotiate a loan from Phillips about the middle of March, 1964 (pp. 73, 74); he discussed with the engineering and maintenance department the question of erecting a pilon sign at his own retail station (75), and went in to see the division manager "mainly to get lunch." (pp. 75, 76) On page 75, he referred to the division manager as "boss" and immediately explained that he meant the division manager. On page 77, he stated flatly that he was mistaken when he referred to the division manager as the "boss." His testimony on pages 75, 76, and 77 completely annihilates any inference that the division manager was Bridges' boss in the sense that he could control Bridges' operations.

The division manager and Bridges discussed gaining more volume in Helena and a new advertising program which was being initiated (page 76); Bridges told the division manager he was planning to lower prices (Tr. 79) at his own retail station in Helena only. (Tr. 96) Asked if the division manager forbid him to lower his price, he answered, "He couldn't very well", (Tr. 79) and added on page 80, "He sure didn't tell me to do it either."

Bridges asked a marketing assistant of Phillips in Spokane if he could get any assistance and his request was refused. (Tr. 80, 81)

The inference intended to be created by the state-

ment that Bridges and management "personnel in Spokane discussed gasoline prices" (Br. p. 6) is destroyed by the very evidence to which appellant refers in support of it.

That evidence shows that all that was said about gasoline prices was Bridges' assertion that he was going to lower retail prices at his own station and that Phillips could do nothing about it; that the other individual appellees were not present; and that Phillips flatly refused to give Bridges any assistance.

The next sentence on page 6 of the brief reads:

> "W. J. BRIDGES also in the month of March, 1964, met with the 'Operators', DONALD W. CULLEN, JAMES H. NORWOOD, and CURTICE GARDNER, and one DON HAMILTON, representative of Phillips Petroleum Cobpany, and discussed lowering of gasoline prices, the matter of the 'Independents' operation and the lowering of the prices of gasoline to 33.9 cents per gallon. (Tr. 132, 158, and 159)."

This statement is repeated almost verbatim at page 20, with the same reference to the transcript.[5]

This brings us back to Don Hamilton.

Don Hamilton

There is no question that Hamilton was a district representative of Phillips in Montana (Tr. 77), but there is not one word in the record which even suggests that Hamilton had any knowledge or notice of, or that he participated in, any conspiracy, or that he had any authority with respect to prices.

The only witness who testified that Hamilton was

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[5]These are the only references to Hamilton in the appellant's brief.

present at any meeting with the individual appellees was appellee Norwood, a retail station operator.

Called as a witness by appellant's counsel Norwood testified:

> "Q. Mr. Norwood, do you recall the month of March, 1964, when the price of gasoline was lowered in the City of Helena?
>
> A. I recall when it was lowered. I wouldn't say as to what month, day or year.
>
> Q. Did you attend a meeting in the Steamboat Block?
>
> A. No, sir.
>
> Q. Didn't? Did you attend any meeting with James Bridges and the other Phillips 66 dealers at 1901 North Main Street[6] in Helena in the month of March?
>
> A. I attended a meeting. As I say, I don't recall dates.
>
> Q. Was Mr. Don Hamilton at that meeting?
>
> A. Yes.
>
> Q. And he is the Phillips 66 representative, is he not?
>
> A. Yes.
>
> Q. And at that meeting was the price of gasoline discussed?
>
> A. Yes.
>
> Q. And the lowering of the gasoline prices.
>
> A. Not necessarily.
>
> Q. Well, at all?
>
> A. Mr. Bridges might have informed us that he would lower the prices.
>
> Q. Was there a discussion as to what would happen if gasoline prices were lowered?
>
> A. No."
>
> (Tr. p. 158, line 11 to p. 159, line 11)

---

[6] This is the station that was operated by appellee Bridges.

The only discussion of "lowering of gasoline prices" at the meeting was the statement by Bridges, already made to Phillips in Spokane, that he was going to lower prices at his own retail station.

There was no discussion of "the matter of the 'Independent's' operation and the lowering of prices of gasoline to 33.9 cents per gallon."

The testimony on page 132 of the transcript is taken from that of appellee Gardner, a retail station operator. Nowhere in his entire testimony does he mention Don Hamilton. He did not fix the date of the meeting at 1901 North Main Street about which he testified other than to say it was prior to the lowering of prices in March, 1964. (Tr. 131, 132) Pages 158 and 159 relate to the testimony of appellee Norwood, set forth above; Norwood did not fix the date of the meeting about which he testified.

In other words, the record shows no connection between the meeting about which Gardner testified and the meeting to which Norwood referred.

This is yet another instance of appellant's persistent effort to substitute surmise for proof.

The first full paragraph on page 7 of the brief at first glance implies that Phillips had some connection with placing at the various retail stations signs "commonly used for gas wars." The brief does not so state, and reference to the transcript citations in the brief clearly demonstrates why no such statement could be made.

The brief next states on page 7 that the reduced prices continued into the fall of 1964. There is no

evidence whatsoever as to when the "gas war" ended.

In the second paragraph on page 7, appellant states that Phillips "paid a subsidy which insured the 'Operators' a five cents a gallon profit, regardless of how low the price descended. (Tr. 169, 92, 93)."

Here again the inference is that Phillips granted such a subsidy to the lessees of the retail stations. The testimony positively refutes this inference.

On page 93 Bridges stated that other companies were granting their dealers a competitive price allowance; Phillips took no action on the price to its jobber, Bridges, until June 23, 1964, almost three months after the "gas war" started.

On June 23, 1964, Bridges sent a telegram to Phillips at Bartlesville, Oklahoma (Tr. 95), stating that he and the other retail dealers were facing financial ruin because of inability to compete in the local gasoline market, and that the other major oil companies and other suppliers had, since June 1, 1964, been subsidizing their jobbers. The telegram requested immediate assistance. (Individual defendant's Exhibit No. 1)[7]

Then, and then only, some twelve weeks after the law suit was commenced, did Phillips grant a competitive price allowance *to Bridges* of five cents a gallon. (Tr. 92) The record does not show the exact date the allowance was granted by Phillips, but obviously it was several weeks after the other suppliers had granted allowances on June 1. By June 23 Bridges had to have an allowance or close up his plant.

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[7] This exhibit is set forth in full at Appendix, page 1.

Under these circumstances, Phillips gave Bridges the competitive price allowance.

We re-emphasize that Phillips did not grant any allowance to Gardner, Norwood or Cullen.

The above was the only allowance which Phillips granted. Appellant's statement that Phillips 66 "paid a subsidy which insured the 'Operators' a five cents a gallon profit, regardless of how low the price dropped" is utterly without support in the record; it contradicts the record, and it is so absurd on its face that no further comment is necessary.

The only other discussion of the "facts" as to conspiracy is found on page 19 of appellant's brief. Appellant concedes that Bridges was a jobber, not a consignee; that Phillips leased all four gas stations to Bridges, who sub-leased the Gardner, Norwood and Cullen stations to them under a verbal arrangement. Appellant repeats the statement made on page 6 as to national advertising, credit cards and uniform painting, with the same transcript references. We have already analyzed that evidence.

Appellant then states:

> "The jury may infer that Phillips gave Bridges the authority to act for it in conspiracy to fix gasoline prices."

No authority is cited for that bald statement; none exists.

Section 93-1301-2 of the Revised Codes of Montana defines an inference as follows:

> "93-1301-2. (10601) Inference defined. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of the law to that effect."

Under Montana law, an inference cannot be based on another inference or on a presumption. The Montana Supreme Court so held in *Monforton v. Northern Pacific Railway Company*, 138 Mont. 191, on 211, 355 P. 2d 501 (1960).

The following statement from *State v. Barick*, 143 Mont. 273, 389 P. 2d 170 (1964) is almost startlingly apposite to appellant's contentions:

> "[6] An inference is to be distinguished from mere suspicion which is defined as 'the act or an instance of suspecting: imagination or apprehension of something wrong or hurtful without proof or on slight evidence; * * *' Webster's New International Dictionary (3rd ed. 1961)." (p. 283)

Actually, nothing referred to by appellant justifies even a suspicion that Bridges was an agent of Phillips. Appellant's position amounts to asking this court to disbelieve uncontradicted evidence which the lower court accepted.

We challenge appellant to set forth in its brief any specific evidence on which it bases its contention that the jury could have inferred that Bridges had authority to act for Phillips in any conspiracy.

Phillips did not have any contact with the individual appellees other than Bridges, the independent jobber, except through its district representative, Don Hamilton, and all he knew was that Bridges proposed to lower prices at his own station. As we have shown the lower court found that at the meeting he attended "there were no agreements reached; that the price was discussed." (Tr. 177)

The record is so completely lacking in any evidence

that Phillips had any knowledge or notice of a conspiracy among the individual appellees that the lower court could not have held otherwise.

III. Appellant's Cases Not In Point

At the outset we wish to state that we have examined every case cited in appellant's brief and that none is even remotely in point on the facts as to conspiracy.

It is axiomatic that a major oil company cannot be charged with notice or knowledge of a conspiracy merely because a *jobber* who purchases gasoline from it, which he is free to dispose of as he pleases, advises the company that he intends to lower retail prices at a retail gas station which he owns and operates. That is exactly the situation here.

Appellant does not make any claim that any case cited by it is even remotely in point; indeed, appellant does not set forth the fact situation in any case cited by him and with good reason, for none of the cases cited has even the slightest resemblance on the facts to the case at bar.

IV. Statutes Involved

Appellant relies on section 1 of the Sherman Act (15 U.S.C.A. sec. 1) making illegal every combination or conspiracy in restraint of trade or commerce, and on section 2 of that Act[8] providing that monopolization or attempt to monopolize or conspiracy with any other person to monopolize any part of the trade

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[8] These statutes are set forth in the Appendix at page 2.

or commerce is a violation of the anti-trust laws. (Appellant's brief, pp. 15, 16)

CONTROLLING AUTHORITIES

"The plaintiff in a suit for damages under the anti-trust laws has the burden of establishing the alleged monopoly, conspiracy and restraint of trade."

(Toulmin's Anti-Trust Laws, Vol. VI, sec. 16.49, page 461)

Appellant recognizes that it has the burden of proving by a preponderance of the evidence that Phillips was a party to the alleged conspiracy. (Appellant's brief, p. 21)

V. Presumption Of Lawful Conduct Has Weight As Evidence

Included in this burden of proof is the necessity of overcoming the presumption of lawful conduct, which presumption has weight as evidence.

Equitable Life Assurance Society v. Irelan, 123 F. 2d 462, 464 (9 Cir. 1941).

State v. Rice, 134 Mont. 265, 272, 329 Pac. 2d 451 (1958).

See also 16 Am. Jr. 2d, Conspiracy, sec. 59, p. 156 and 15A C.J.S., Conspiracy, sec. 28, p. 688.

VI. Flintkote v. Lysfjord, 246 F. 2d 368 (9th Cir., 1957)

With the above foundation, the decision of this court in *Flintkote* leads to the indubitable conclusion that the judgment below must be affirmed; in *Flintkote* this court:

(1) Quoting from its decision in *Weniger v.*

United States, 47 F. 2d 692 on 693, said on page 374 of *Flintkote:*

> "The law requires proof of the common and unlawful *design and the knowing participation therein of the persons charged as conspirators* before a conviction is justified." (Emphasis supplied)

(2) Quoting from *Johnson v. J. H. Yost Lumber Co.*, Cir., 117 F. 2d 53, on 61, said on page 376 of *Flintkote:*

> "A fraudulent conspiracy may be shown by circumstantial evidence, *but the facts and circumstances relied upon must attain the dignity of substantial evidence* and not be such as merely to create a suspicion." (Emphasis supplied)

Appellant quotes from only two cases on the subject of conspiracy. Neither is in point.

The first is *Ingram v. Phillips Petroleum Company*, 252 F. Supp. 674 (1966).

The matter was before the District Court of New Mexico on motions for summary judgment. (p. 675) The defendants were seven major oil companies. The plaintiffs were jobbers for Phillips Petroleum Company (p. 676) Plaintiffs complained of unlawful price discrimination (p. 676) which is not involved in any way in the case at bar.

As to conspiracy, which is the only feature of *Ingram* which could be applicable in the instant case, the court said on page 676:

> "It is alleged that 'This conspiracy has been accomplished by agreements and understandings among the defendants to fix the prices of gasoline in the area involved'."

The conspiracy count was based on *selective* price

reductions. (p. 679) Nothing more need be said to show that *Ingram* is not in point on the facts. Appellant makes no claim that it is.

Contradictory statements were made in the affidavits and depositions of the opposing parties. (p. 677)

The following quotations from the decision make it clear that the court denied summary judgment because a trial would give plaintiffs a better opportunity to establish a conspiracy if they could:

> "We must conclude from a study of the evidentiary material that the evidence of conspiracy is less than strong." (p. 678)
>
> * * *
>
> "A trial will afford to plaintiffs a better opportunity to establish the contention that the defendant's conduct is a part of a conspiracy on their part." (p. 679)

Contrasted to the situation in Ingram, the district court in the case at bar allowed appellant great leeway in trying to tie Phillips into a conspiracy and, after appellant had done its best, correctly granted Phillips' motion for a directed verdict.

Significantly, at the trial on the merits in *Ingram*, plaintiffs dismissed their claims under the Sherman Act. (*Ingram v. Phillips Petroleum Company*, 259 F. Supp. 176, on 178 (1966).

Ingram affords appellants here no aid or comfort whatsoever. The fact that plaintiffs quit on the conspiracy charge is, on the other hand, favorable to Phillips in the case at bar.

Under the heading "Participation" appellant quotes

on page 27 from *United States v. Ward Baking Co.*, 224 F. Supp. 66 (1963).

The very first sentence of the quoted language is in complete accord with our contentions. It reads:

> "A person does not become liable as a conspirator *unless he knows of the existence of the conspiracy, agrees to become a party, and with that knowledge commits some act in furtherance thereof.*" (Emphasis supplied) (Appellant's brief p. 27, decision p. 69)

In the *Ward* case the evidence of conspiracy and of defendant's participation therein was clear and abundant. It is set forth in detail on pages 71 and 72; since appellant does not make any contention that it is in point, we merely refer the court to those pages.

Since Phillips had no notice or knowledge of any conspiracy, it certainly could not perform any act in furtherance thereof.

VII. Competitive Price Allowance No Evidence of Conspiracy

While appellant refers to the competitive price allowance on pages 7 and 21, the brief does not attempt to make any point of it, for these are the only pages which mention it. Clearly, since it did not occur for some three months after the Helena retail dealers lowered their prices, it cannot be evidence that Phillips was a party to a conspiracy when the retail prices were lowered.

If appellant contends or seeks to infer that by granting the competitive price allowance to Bridges, Phillips became party to an existing conspiracy among the dealers, there are two complete answers.

First, Phillips had no knowledge or notice of any conspiracy, if one existed; and second, the law is clear that competitors may always allow price reductions to meet competition.

That principle is laid down in *McWhirter v. Monroe Calculating Mach. Co., Inc.* 76 F. Supp. 456 (1948), where the court says on page 462:

> "It is a well established principle of law that notwithstanding what the established trade practices and customs between competitors may be, *competitors may always allow such discounts and reductions in price as may be necessary to meet competition.*
>
> * * *
>
> "When he knows what his competition is going to do in the way of making discounts, he may formulate his policy in such a manner as to meet that competitive situation." (p. 462, Emphasis supplied)

The correctness of the principle is self-evident. Phillips did not grant the competitive price allowance until after the other suppliers had reduced their prices in Helena. To forbid Phillips to meet that competition would be to dry up its Helena market.

VIII. Attempt to Monopolize

Appellant's brief devotes pages 28 and 29 to a discussion of monopoly.

The opening paragraph reads as follows:

> "The testimony shows that Phillips, and the other major oil companies, controlled eighty per cent (80%) of the gasoline market in the State of Montana and in the Helena area (Tr 27); that the price lowering was aimed at the 'Independents', particularly Gasomat (Tr. 109) and others, and that the gas prices were lowered to

> such an extent that the Appellant, an 'Independent' was forced out of business (Tr. 43, 44). Thus, the attempt to monopolize as prohibited by the Sherman Act."

The record does show that the major oil companies sold eighty per cent (80%) of the gasoline sold in the Helena area. (Tr. 27) The record also shows that gasoline of the following companies was being sold in Helena in addition to Phillips: Union Oil Company, Texaco, Husky, California Company, Continental Oil, and Standard Oil Company (Tr. 88), and Big West. (Tr. 10)

There is no showing what per cent Phillips or any other supplier had; there has never been any claim that the suppliers conspired to monopolize the market. Certainly appellant does not contend that the fact that a number of manufacturers sell a large per cent of a given product sold in a given area constitutes them conspirators or creates a monopoly. It is common knowledge that oil companies are fiercely competitive and that there are so many of them that no single one can monopolize a given market the size of Helena.

Appellant refers to page 109 of the transcript, apparently with at least the inference that the price lowering by the individual appellees was aimed at the independents, particularly Gasomat. Reference to page 109 shows that the witness was appellee Bridges and that he was testifying about lowering the price at his own station. In that context he stated:

> "My only intent was to meet the competition

of the Gasomat, which was my immediate competition."[9]

The important fact, so far as Phillips is concerned, is that the uncontroverted evidence shows that Phillips had nothing whatsoever to do with Bridges' lowering his price.

Appellant then states that gas prices were lowered to such an extent it was forced out of business.

Once again apellant has failed to connect Phillips with the transaction. We have shown (supra p. 15) that Bridges was not an agent for Phillips; it follows that Phillips is not responsible in any manner for Bridges' actions.

The next statement is an absolute non-sequitur. It reads:

> "Thus, the attempt to monopolize as prohibited by the Sherman Act."

In other words, having failed to charge any attempt to monopolize by the wholesale gasoline suppliers, appellant in effect says that because Bridges lowered the price at his own station, Phillips is guilty of monopolizing the market, although at least eight major suppliers remained actively in competition in the Helena market.

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[9] Gasomat was an automatic coin-operated station (p. 109) about a block and a half from Bridges' own station and the only other gasoline outlet in the immediate area. (Tr. 111) Gasomat was selling gasoline for 29.9 cents a gallon (Tr. 49), eight cents a gallon less than Bridges' price before he lowered it, and four cents less afterwards. (Tr. 96)

IX. Klor's v. Broadway-Hale Stores

Appellant concludes its argument on monopoly with a long quotation from *Klor's v. Broadway-Hale Stores*, 359 U. S. 207, 3 L. Ed. 2d 741, 79 S Ct. 705. (Br. pp. 28, 29)

In that case plaintiff and defendant operated adjoining stores in San Francisco; both sold radios, television sets, refrigerators and other household appliances. Klor's charged that Broadway-Hale and ten national manufacturers and their distributors conspired to restrain and monopolize commerce in violation of sections 1 and 2 of the Sherman Act (359 U.S. 208), and not to sell to Klor's or to sell to them at discriminatory prices. (359 U.S. 209)

Defendants did not dispute the allegations but sought summary judgment and dismissal of the complaint for failure to state a cause of action, and submitted unchallenged affidavits showing that there were hundreds of other household appliance retailers selling similar appliances. (359 U.S. 209, 210)

The district court held that it was a "purely private quarrel" between Klor's and Broadway-Hale and dismissed the complaint. (359 U.S. 210)

This court affirmed on the ground that there was no showing the public was injured. (359 U.S. 210)

The Supreme Court held that the complaint clearly showed a prohibited group boycott and that defendant's affidavits provided no defense to the charges. (359 U.S. 210, 212)

To state the facts is to distinguish the case at bar from the *Klor's* case. In our case there is no claim

that the supplier of gasoline conspired to deprive appellant of its supply of gasoline; in other words, there is no charge of a group boycott, which was the basis for the decision in *Klor's*.

There is simply no proof and no contention in appellant's brief that Phillips monopolized appellant's supply of gasoline. Appellant continued to obtain its gasoline from the same source until it went out of business.

Klor's simply is not applicable.

X. Recapitulation

The following recapitulation of what the record shows as to appellant's contentions is set forth to summarize the situation for the court:

Appellant's Contentions:	*The Record Shows:*
1. Phillips owned or leased some of the stations.	1. But Bridges was a jobber, purchasing gasoline from Phillips but free to dispose of it to whom and at such prices as he saw fit (Tr. 98, 99) Phillips had no control over prices at retail level. (Tr. 79)
2. Bridges talked with Phillips' district manager in Spokane.	2. Bridges told district manager he was planning to lower prices at retail level. (Tr. 79) *Phillips positively refused to give any assistance.* (Tr. 81)
3. Phillips' district representative Hamilton was present at meeting of individual appellees in March 1964 where they discussed lowering of retail prices.	3. All individual appellees were present; Bridges said he was going to lower his retail prices, but there was on discussion of what would happen if prices were lowered. (Tr.

Appellant's Contentions:	*The Record Shows:*
	159, 160) *And that is all.* There is no evidence in the record of Hamilton participating in any way or of any discussion of "Independents."
4. Later in July 1964 Phillips paid a "subsidy," which insured individual appellees of 5c a gallon profit.	4. In July 1964 Phillips granted Bridges, the jobber, a 5c a gallon *competitive* price allowance which he could pass on or keep for himself. (Tr. 92) This was done only after other majors had reduced prices. The Trial Court specifically found there could not be an antitrust violation "in the absence of some knowledge that an illegal conspiracy had been created by the individual defendants." (Tr. 181)
5. Appellant infers Phillips participated in a conspiracy to lower prices to hurt Uniform as an independent.	5. The Trial Court clearly found that there was no evidence that Phillips had any knowledge of a conspiracy, if one existed, (Tr. 177-180) Specifically the Trial Court made the finding that if a conspiracy existed as to the individual defendants "there is not sufficient evidence now—to indicate that defendent Phillips Petroleum Company had any knowledge of that conspiracy." (Tr. 181)

CONCLUSION ON CONSPIRACY

The lower court was right in granting the motion of appellee Phillips for a directed verdict and in entering judgment in favor of Phillips because appellant did not prove that Phillips had any knowledge or notice of any conspiracy among the individual appellees, if one existed.

INTERSTATE COMMERCE

Even if appellant had established a conspiracy to which Phillips was a party the judgment in favor of Phillips (R. p. 60) must nevertheless be affirmed because of appellant's utter failure to sustain its burden of proof that there was any restraint on trade or commerce.

I. The Conspiracy Charged Was Price-Fixing at Local Level

The conspiracy charged was price-fixing of Phillips products at the local level in Helena, Montana, and was intrastate in character. Paragraph 13 alleges that defendants combined and conspired "to monopolize and restrain trade in and to eliminate competition from the gasoline marketing industry *in the City of Helena, Montana,*" and " to destroy the business of the plaintiff and other Independents and to eliminate *from the City of Helena* all of the Independents." (Emphasis supplied)

Paragraph 14 alleges that Phillips and the individual appellees, all of whom operated retail gasoline stations *in Helena* (paragraphs 4 to 8), conspired to reduce retail prices of gasoline at the retail stations of the individual appellees. (paragraph 14 A)

There can be no question that the conspiracy charged was price-fixing of Phillips gasoline sold at retail stations at the local level *in Helena.*

The conspiracy charged involves and is concerned only with the *Phillips*' products sold at retail; it was not charged that there was any conspiracy as to the products sold by appellant.

Before discussing the evidence proffered by appellant, we wish to clarify the underlying principles.

II. The Controlling Principles

The applicable law, so far as the issue of interstate commerce is concerned, is spelled out by this Court in *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F. 2d 732 (1954), cert. den. 348 U.S. 817.

This case involved appeals of eleven defendants who had been convicted of violations of "sections 1-7, 15 note" of the Sherman Anti-Trust Act. Section 1 and 2 are the same sections which defendants in the case at bar are charged with violating. None of the other sections referred to in *Las Vegas* are relevant for present purposes,[10] so *Las Vegas* is on all fours with the case at bar so far as the *legal issues* with respect to interstate commerce is concerned.

In *Las Vegas* this Court held that there was ample proof of the conspiracy charged and went on to discuss

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[10] Section 3 relates to conspiracies in restraint of trade in territories and in the District of Columbia; section 4 covers jurisdiction of courts and duties of United States attorneys; section 5 is concerned with bringing in additional parties; section 6 with forfeiture of property in transit and section 7 with the definition of "Person"; section 15 authorizes suits by persons injured and provides for treble damages.

the interstate commerce issue.

The indictment charged both that the plumbing and heating supplies in question were in the flow of interstate commerce (pp. 738, 740) and there was a substantial effect on commerce. (p. 741)

The evidence in *Las Vegas* showed that no plumbing and heating supplies used in Southern Nevada were manufactured in Nevada; they moved in interstate commerce from eastern factories and from California; 46% were shipped directly to plumbing contractors; some were purchased by the contractors from a Nevada wholesaler who obtained them from out-of-state sources; some were purchased from the wholesaler pursuant to prior orders and substantial quantities of the supplies sold by the wholesaler were shipped by his out-of-state sources directly to plumbing contractors on the wholesaler's order.

This Court held that on this evidence the trial court properly left to the jury the question whether the flow of materials was *in* commerce. (p. 745)[11]

On the subject of effect on interstate commerce this Court, after stating that a price-fixing conspiracy which operates on or within the flow of interstate commerce affects that commerce as a matter of law, continued on page 747:

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[11] At page 31, post, we contrast the evidence in the case at bar and show that the product here in question (the Phillips gasoline sold at the retail gas stations of the individual appellees) was not in commerce.

> "But a price fixing conspiracy at a purely local or intrastate level does not, as a matter of law, affect the flow of commerce. Whether a purely local or intrastate conspiracy unreasonably restrains interstate commerce is primarily a factual question, i. e. *does the local price fixing conspiracy affect substantially the flow of interstate commerce?* If the answer is yes, then only are we concerned with the effect of the price-fixing under the per se doctrine. *In fact, unless there is a finding that the local and intrastate activities complained of and as alleged in the indictment, substantially affected interstate commerce, there is no jurisdiction in a district court over the alleged Sherman Act violation.*" (Emphasis supplied)

This Court reasserted this rule of law in the companion civil cases of *Marietta Page v. Work*, 290 F. 2d 323 (1961) and *C. A. Page Publishing Co., Inc., v. Work*, 290 F. 2d 334 (1961), cert. den. 368 U.S. 875, which at page 337 adopts the *Marietta Page* opinion.

Appellant in the *Page* cases contended that the acts charged constituted *per se* violations of Section 1 of the Sherman Act, and that, where a *per se* violation has been made out, "federal jurisdiction attaches, and that the amount of interstate commerce affected by such restraints is immaterial." (p. 331)

This Court summarily disposed of that contention in the following language on page 331:

> "The so-called qualitative test of the illegal per se doctrine does not itself operate to extend federal jurisdiction under Sections 1 and 2 to purely local restraints applied at a local level to a product which never enters into the flow of interstate commerce. *The argument made here by appellant has been squarely rejected by this Court in Las Vegas Merchant Plumbers Ass'n v. United*

States, 9 Cir., 1954, 210 F. 2d 732, 747 * * *." (Emphasis supplied)

The opinion then quotes the language above quoted from *Las Vegas.*

III. The Gasoline Sold By Phillips To Bridges Was Not In The Flow Of Interstate Commerce

There is absolutely no evidence from which a jury could have found that the product in question in the instant case (Phillips gasoline) was in the flow of commerce, and appellant does not contend that there is. Neither on page 5 nor on pages 17 and 18, which are the only places in appellant's brief where the subject of interstate commerce is discussed, is there any reference to where the gasoline sold by Phillips to Bridges, the jobber in Helena, and by him resold to appellees Gardner, Cullen and Norwood in Helena, was refined, or from what point it was shipped to Bridges.

Neither is there any evidence whatever on either of these subjects.[12]

All that appellant *did* prove was that Bridges was the jobber for Phillips products in Lewis and Clark County (Helena is the county seat) and that appellees Cullen, Gardner and Norwood acquired the gasoline which they sold at their retail stations in Helena from Bridges as jobber. (Tr. 31, 32). These transactions were clearly intrastate in character.

It goes without saying that as a matter of law activities which are intrastate in character cannot be

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[12] It does appear from the testimony of appellant's president that Phillips had a refinery in Great Falls, Montana. (Tr. 46)

in the flow of interstate commerce.

Since there is no evidence and no contention that the Phillips gasoline which was claimed to be the subject of a price-fixing conspiracy was *in* commerce, appellant had the burden of proof that the (alleged) conspiracy had a substantial effect on interstate commerce under the holdings in the *Las Vegas* and in the *Page* cases. Appellant completely failed to sustain this burden.

IV. There Is No Evidence At All That Commerce Was Substantially Affected

The only possible basis for a claim that commerce was substantially affected would require a showing by a preponderance of the evidence that the effect of the (alleged) conspiracy on appellant's sales substantially affected commerce.

In this connection we call attention to the wholly unjustified inference sought to be created at pages 5 and 7 of appellant's brief that the gasoline it purchased from Yellowstone Pipe Line at Helena was refined from Wyoming crude. There is no direct statement in the brief to that effect, and the record shows why no such statement can be made.

What the record does show is: that appellant's gasoline was obtained from Big West Oil Company, a Montana corporation; approximately one-half came from the Big West refinery at Kevin, Montana; that the balance was delivered at Helena by the pipe line company from a pipe line running from Billings, Montana, to Spokane, Washington (Tr. 12); that the pipe line was owned by major oil companies, including

Carter (now Humble), Continental, Union, Enco and Husky; and *that the gasoline carried by the pipe line "was refined in Billings,* mostly from crude, from the Elk Basin Field in Wyoming." (Tr. 13)

There is not one word in the entire record showing or indicating that any of the gasoline which appellant purchased was refined from Wyoming crude, and appellant made no effort whatsoever to produce any proof that it was.

Actually, under the authorities, proof that the crude oil from which the gasoline refined in Billings came from Wyoming would not have helped appellant; its operations would still be intrastate in character.

This is the holding in *Savon Gas Stations No. 6 and A. & H. Transportation, Inc. v. Shell Oil Company,* 203 F. Supp. 529 (1962), which involved sections 1 and 2 of the Sherman Act, as does the case at bar.

In *Savon,* plaintiffs operated a retail gas station in Maryland (p. 531); plaintiff's gasoline was bought by plaintiff, A. & H. Transportation Inc., or by the president of plaintiff, trading as Arrow Oil Company, at terminals in the Baltimore area; the terminals acquired the gasoline and other petroleum products from out of state sources. Delivery from the terminals was effected by trucks; plaintiffs also bought various items of service station equipment from out of state sources. (p. 533)

After outlining these facts the court said on page 534:

> "While there are certain interstate aspects in the acquisition of the products plaintiffs sell, and the equipment to make sales and render services

> at retail, the decided cases indicate that the retail sale of gasoline, and related products, is intrastate in character. See *Mitchell v. Livingston & Thebaut Oil Company*, 256 F. 2d 757 (5 Cir. 1958); *Brenner v. Texas Company*, 140 F. Supp. 240 (D.C., N.D., Cal. 1956); *Dial v. Hi Lewis Oil Co.*, 99 F. Supp. 118 (D.C., W. D., Mo. 1951); *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (D.C., S.D., Cal. 1951); *Spencer v. Sun Oil Co.*, 94 F. Supp. 408 (D.C., Conn. 1950); *Brosious v. Pepsi-Cola Co.*, 155 F. 2d 99 (3 Cir. 1946); *Lewis v. Shell Oil Co.*, 50 F. Supp. 547 (D.C., N.D., Ill. 1943)."

The cases cited in the quotation from *Savon* amply support the holding.

The Court of Appeals for the Fourth Circuit affirmed in *Savon Gas Stations No. 6 and A. & H. Transportation, Inc. v. Shell Oil Company*, 309 F. 2d 306, (1962), cert. den., 372 U. S. 911.

There is no proof of *any* effect of appellants' operations on interstate commerce. What the record shows as to appellant's operations is the following:

Appellant proved by its president that all of the gasoline sold by it was refined in Montana. (Tr. 13)

Appellant operated only one station and that was *in Helena.* (Tr. 8, 9) There is no testimony that any gasoline sold by appellant ever crossed a state line. Courts can take judicial notice of the distance from Helena to the boundaries of Montana; it is self-evident that only an infinitesimal percentage of the gasoline sold by appellant (appellant's highest volume was only two hundred thousand gallons a year (Tr. 43)) could possibly go out of Montana, and then

only in the gas tank of a motor vehicle. There certainly is no evidence of substantial effect on interstate commerce on these facts.

So far as credit cards are concerned, there is no evidence whatsoever as to the amount or volume of credit card business and consequently no basis for an argument that it had any effect on interstate commerce; and appellant does not attempt to argue this point.

Conclusion On Interstate Commerce

The conspiracy charged was price-fixing with regard to Phillips products sold in Helena. There was no attempt to show that those products were *in the flow of commerce.* That being so appellant had to show a substantial effect of the (alleged) conspiracy on interstate commerce. There is no evidence of any such effect, or any effect whatever, on interstate commerce. It follows that the judgment below should be affirmed on this separate ground.

DAMAGES

The only proof as to damages in the entire record is the unsubstantiated statement of appellant's president that in his opinion the business had a going value of $60,000.00 prior to the reduction in gasoline prices in Helena in March of 1964. (Tr. 46)

That opinion was elicited when appellant's counsel asked his witness Vance, president of Uniform Oil Company:

> "Do you have an opinion as to the value of that (Uniform's) business as a going business prior to the time that this——of the gas reduction?" (Tr. 45)

Counsel for Phillips and counsel for the individual appellees both objected, citing *Flintkote Company v. Lysfjord*, (9 Cir.) 246 F. 2d 368 (1957).

Vance was permitted to answer and stated:

> "As a going business I would say that that business was certainly worth Sixty Thousand Dollars." (Tr. 46)

Appellant's counsel did not attempt to produce any other evidence on the question of damages.

On cross-examination by counsel for Phillips, Mr. Vance stated that he did not have with him any information on the month-by-month volume of gasoline in the year 1964 compared to 1963, (Tr. 52); counsel for Phillips showed him his deposition and after examining it, he admitted that during the months of March, April and May, 1964, the total gallonage exceeded that for the same months in 1963. (Tr. 52, 53) The "gas war" started in March, 1964.

Appellant's argument on the subject of damages consists of a single paragraph on page 30 of its brief. There is no contention that the bald statement of Vance is sufficient. All that appellant says is that appellant was entitled to fair compensation and that:

> "The fact that the precise amount of appellant's damage may be difficult to ascertain should not affect Appellant's recovery, particularly if the defendant's wrongdoings have caused the difficulty in determining the precise amount."

Appellant cites three cases in support of that statement; as we shall show, none of them comes close to holding that the evidence of Vance is sufficient; actually these cases show clearly that it is not.

If appellant had argued that Vance's testimony was sufficient, it would have run head-on into three decisions of this court.

The first is *Flintkote*, the case cited by counsel for Phillips in support of his objection.

In *Flintkote* this court had this to say on the subject of damages:

> "There are three chief types of evidence which the decisions have approved as the basis for the award of damages. (1) Business records of the plaintiff or his predecessor before the conspiracy arose. (2) Business records of comparative but unrestrained enterprises during the particular period in question. (3) Expert opinion *based on items (1) or (2)*. (p. 392)
>
> * * * *
>
> "We do not hold nor imply that a jury verdict could not be upheld under any circumstances solely on the testimony of the plaintiffs. We hold only that if they are qualified to make these estimates, *the record must show their competency and the factual basis upon which they rest their conclusions*. (p. 394, Emphasis supplied.)

Even if it be assumed that the record showed the qualifications of Vance, which is extremely doubtful, no effort was made by appellant to show through Vance, or any other witness, "the factual basis" for his conclusion.

The second decision of this court which appellant would have had to surmount if it had tried to show the sufficiency of its proof on damages is *Standard Oil Company of California v. Moore*, 251 F. 2d 188, cert. den. 356 U.S. 975 (1958). That decision is controlling here.

In that case Moore claimed that his retail gasoline business was destroyed (195) by refusal of Standard and others to supply him with gasoline (196). Moore had retained his land and capital assets, so "the only value which his business had before it was closed that it did not have afterwards was its 'going concern' or 'good will' value." (219) In the instant case appellant sold part of its land to the State Highway Department and the balance to a Butte man, (Tr. 44); the amounts received are not disclosed but it must be presumed those amounts were the market value. The only remaining value was the "going concern" value. Appellant's president fixed that value at $60,000.00 (Tr. 46) "as a going business," but in the light of his failure to produce any supporting figures, either on direct or cross the following statement from page 219 of *Moore* is applicable to appellant's proof:

> "In measuring the value of the good will of such a business, appropriate factors to be considered are: (1) What profit has the business made *over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner?* (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation? See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16-17, 69 S. Ct. 1434, 93 L. Ed. 1765. These are the factors which would influence a prospective purchaser." (Emphasis supplied)

Appellant made no attempt whatsoever to produce that type of proof.

The third case is *Lessig v. Tidewater Oil Company*,

327 F. 2d 459 (1964). In that case plaintiff-appellant complained that he was not permitted to state his opinion as to the profit which he lost as a result of Tidewater's alleged misconduct. This Court rejected his complaint and disposed of his contention in this language:

> "Such opinion testimony is admissible, but only if based upon facts which rationally support it. The offer of proof was simply that it was Lessig's opinion, based upon his experience and knowledge, that but for Tidewater's restrictive practices his earnings would have approximated seven hundred dollars a month, or about four hundred dollars per month more than he in fact averaged. *There was no offer to show how his estimate was made. The testimony was inadmissible, absent this foundation, and it was* ex-excluded upon that express ground." (pp. 473, 474) (Emphasis supplied)

A slightly different approach, reaching the same result, is found in the decision of the Montana Supreme Court in *Brown v. Homestake Exploration Company*, 98 Mont. 305, 39 Pac. (2d) 168 (1934). The action was based on alleged failure to develop an oil property. The Court held that the fact that the amount of damages is difficult of ascertainment will not result in denying them *if the best obtainable evidence is produced.*

In *Homestake*, the Court said on pages 337 and 338:

> "A reasonable basis for computation and the best evidence obtainable under the circumstances and which will enable the jury to arrive at a reasonably close estimate of the loss is sufficient. *(Hoffer Oil Corp. v. Carpenter*, supra; *Eastman*

> *Kodak Co. v. Southern Photo Material Co.*, supra; *Kennett v. Katz Construction Co.*, supra; *Osterling v. Frick*, 284 Pa. 397, 131 Atl. 250; *Prejean v. Delaware-Louisiana Fur Trapping Co.*, (C. C. A.) 13 Fed. (2d) 71.)"

Uniform made no effort whatsoever to produce the best available evidence. It made no attempt to support its president's estimate that the "going concern" value was $60,000.00. It did not even show to what date that estimate applied. On cross-examination its president nonchalantly admitted that he had no comparative records for 1963 and 1964 (Tr. 52); neither he nor Uniform's counsel offered to obtain and supply such figures; he did admit that gallonage sales during the first months of the "gas war" exceeded those for the corresponding period in the previous year. (Tr. 53) Comparative figures were essential under the best evidence rule. The unsupported testimony that the "going concern" value was $60,000.00 was improperly admitted.

Even if it were to be considered as properly admitted it is still without probative value because appellant did not even attempt to supply the best evidence, which would at the very least include figures on previous profits, if any, and proof of a reasonable prospect that such profits would have continued. (*Standard Oil Company v. Moore*, supra).

None of the three cases cited by appellant on page 30 of its brief detracts in the slightest degree from the above rules. Rather, these cases themselves show that appellant's attempt to prove damages was a woeful failure.

In the first case, *Bigelow v. R.K.O. Radio Pictures*, 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946), plaintiff submitted detailed evidence on two theories designed to show loss of profits. (257, 258)

The Court of Appeals rejected both theories (259, 260)

The Supreme Court stated on page 262 that

> "The fair value of petitioner's right thus to continue their business depended on its capacity to make profits."

and went on to say that

> "even though RKO's acts precluded ascertainment of damages more precisely, an award cannot be based on guesswork." (264)

This Court in *Flintkote*, quoting from *Bigelow*, said on page 394:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork."

Bigelow, as the above quotations show, precludes an award of damages in the instant case.

The next case is *Pennington v. United Mine Workers*, 325 F. 2d 804 (6 Cir. 1963).

The union brought an action to recover royalties under an agreement and defendants filed a cross-claim for damages under the Sherman Act (806, 807); Defendants introduced evidence showing the amount of their shipments over a three year period, a comparison of the prices received with the national average price over the same three years (815), and the potential market. (816)

This evidence certainly afforded a basis for a finding of loss of profits; appellant in our case did not even attempt to show loss of profits. The simple fact is that there is no evidence whatsoever in the entire record that appellant here ever made a profit, either before or after the "gas war."

The third and last case cited by appellant on damages is *Richfield Oil Corporation v. Karseal Corporation*, 271 F. 2d 709, decided by this Court in 1959.

This case so strongly supports Phillips' position that we would have cited it and quoted from it if appellant had not cited it.

In that case Karseal offered credible proof of the salability of its product as compared to a competitive product, the amount of the latter sold at Richfield stations, that Karseal could supply the amount in question and Karseal's net profit per case. (714). This court held on page 715:

> "Under all the facts in the case the damages must have a reasonable and fair relationship to the type, extent and period of the restraint applied, the number of outlets affected by the restraint and the kind of product, its price and salability, the profit made on sales, and an estimate of the amount of profit lost by reason of the illegal activities of the defendant. There was here proof of such matters."

In the case at bar there is no evidence of any of the following:

1. The extent and period of the "gas war."
2. Salability by appellant.
3. The profit made on sales, or
4. Any estimate of the amount of profit lost.

The evidence in the three cases relied on by appellant is in such sharp contrast to the wholly unsupported guess upon which appellant relies in our case that further comment as to that contrast would

As we have shown, Phillips was not guilty of wrongdoing, so no wrongdoing on its part could have caused any difficulty in establishing damages.

Additionally, appellant sought to base its claim for damages on the value of its business as a going concern at the time gasoline prices were reduced in Helena. (Tr. 45, 46) No one could claim, even on appellant's theory, that any action of Phillips could have caused any difficulty in showing profits prior to that date. Appellant had to determine profits, if any were made, as a basis for filing income tax returns. For some reason appellant chose not to present the available evidence. Its attempt now to place on Phillips the blame for its failure must fall flat on its face.

Wholly apart from any other reason, the judgment below should be affirmed because of the total and complete failure to produce any probative evidence as to damages.

CONCLUSION

The judgment of the lower court should be affirmed on each of the following grounds separately:

1. The lower court's findings that Phillips had no notice or knowledge of any conspiracy among the individual appellees, if one existed, are fully supported by the evidence.

2. Appellant failed to prove that the transactions involved were in commerce; under the authorities they were *intrastate* in character and there was no showing that they substantially affected trade or commerce.

3. Appellant did not prove any damages.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Sam B. Chase

Attorney

CERTIFICATE OF SERVICE BY MAIL

I, KENDRICK SMITH, Attorney for appellee Phillips Petroleum Company, hereby certify that the foregoing brief of said appellee was served on each of the following:

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Attorney for Appellant

Gene Picotte, Esq.
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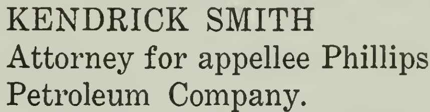
833 North Main Street
Helena, Montana
Attorney for Appellees W. J. Bridges, Donald W. Cullen, Curtice Gardner and James H. Norwood

by mailing three (3) copies to each at their address above set forth this 14 day of September, 1967.



KENDRICK SMITH
Attorney for appellee Phillips Petroleum Company.

CORETTE, SMITH, DEAN & WELLCOME
Professional Building
Butte, Montana

APPENDIX

WESTERN UNION

6-23-64
Defendant's
Exhibit
Cv. 1132
Ind. Def. No. 1

Phillips Petroleum Co.
Home Office
Bartlesville, Oklahoma

Attention: Mr. S. E. Floren
Legal Department

In re: William J. Bridges, d/b/a
W. J. Bridges & Son—Helena Jobber

Gentlemen:

The above-named jobber is facing financial ruin by reason of his inability, and the inability of the retail dealers to whom he sells, to compete price-wise in the local gasoline market. Said retail dealers are likewise facing ruin. This situation stems from the following facts:

The other majors and other suppliers are subsidizing their jobbers, consignees and dealers in the local market, and have been doing so since about June 1, 1964. You have refused to assist Bridges and his dealers by subsidy or otherwise, although requested to do so. The result is that Bridges and said dealers are presently sustaining a combined net loss of three cents per gallon, and if they are not given immediate assistance by you, they will shortly be out of business and in the worst possible financial circumstances. The legal and business situations of Bridges and said dealers are such that they have no legal or practicable source of supply other than your company.

You are hereby requested to render immediate assistance to Bridges and said dealers in this matter,

either by way of subsidy or otherwise. Please advise immediately, by collect wire or telephone call, whether such assistance will be forthcoming or not, and when.

Gene A. Picotte
Attorney for William J. Bridges,
d/b/a W. J. Bridges & Son.

§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, that nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed

guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine ont exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890. c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. *Monopolizing trade a misdemeanor; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.